

PRESERVATION OF ERROR: PRETRIAL AND TRIAL

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September 3, 2008
Austin

CHAPTER 1

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PRESERVATION OF ERROR: PRETRIAL AND TRIAL

I. INTRODUCTION

Although preservation requirements often sound simple enough in theory, in practice they can be difficult for even the most able trial lawyer. In certain contexts, preservation requirements make “compliance a labyrinth daunting to the most experienced trial lawyer.” *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). For one thing, the rules can be very technical. For another, even if the lawyer correctly preserves a complaint at one step of the trial process (for example, by pleading a specific affirmative defense), she can still waive that complaint at another step along the way (for example, by failing to tender a properly worded jury question).

Moreover, tactical considerations often weigh against rigorous compliance with preservation requirements. For example, once the trial court has determined that it is going to admit certain evidence you believe should be excluded, do you object each and every time the evidence is offered or discussed? If preservation were a trial lawyer’s only concern, the answer, quite obviously, would be yes. From the appellate lawyer’s standpoint, once is never enough, and you can’t get too much of a good thing.

Nonetheless, preservation is not (and should not be) the trial lawyer’s only concern. Among other things, the trial lawyer must also be concerned with the judge’s and the jury’s reactions to her repeated objections. Is she just drawing unwanted attention to the evidence, increasing its importance in the eyes of the jury? Is she irritating a judge she needs to go her way on more crucial issues? Trying to balance these competing interests is difficult under the best of circumstances; in the heat of trial, when a lawyer has so many issues competing for her attention, it can be impossible.

So, what do you do? Our suggestion is that you know what it takes to preserve a specific complaint, and to the extent possible, plan your strategy well in advance of trial. Some points may not be worth preserving. Some points will be. Deciding which points fall into which category requires thought and analysis. To make the best decision, the trial lawyer needs to be well informed about the case (its facts, its proof, its problems, and the applicable law) and preservation requirements. This paper attempts to make preservation of error less “a risky gambit in which counsel has less reason to know that he or she has protected a client’s rights,” *id.*, and more an exercise in preparation.

II. GENERAL PRESERVATION REQUIREMENTS

Rule 33.1(a) of the Texas Rules of Appellate Procedure states:

(a) *In general.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion and the complaining party objected to the refusal.

Generally then, in order to preserve any complaint for appellate review, a party must specifically request that the trial court take some action and obtain a ruling on the request. If the trial court refuses to rule, the complaining party must object to the refusal to rule. TEX. R. APP. P. 33.1(a). Otherwise, a party is left to urge only complaints that can be raised for the first time on appeal, a very limited mix of fundamental rights. *See In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999) (describing error that can be raised for the first time on appeal, listing “essentially three categories of rights and requirements.”).

Rule 33.1(a) of the Rules of Appellate Procedure provides only the general requirements necessary to preserve a complaint for appellate review. It does not purport to address the individual requirements necessary to preserve any specific complaint for appellate review. Do not be misled. Rule 33.1(a) is neither all inclusive nor exclusive of other preservation requirements. The rule specifically requires that your complaint must comply “with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure.” TEX. R. APP. P. 33.1(a)(1)(B). All complaints are not treated equally—and they cannot be preserved in the same way. Nonetheless, rule 33.1(a) should be considered as providing the minimum requirements for preserving any error.

A. The Request, Objection, or Motion Must Appear in the Record

In Texas state court, the appellate record consists of the clerk’s record and the reporter’s record. TEX. R. APP. P. 34. The clerk’s record contains the written pleadings, motions, orders, etc. in the trial court’s file. TEX. R. APP. P. 34.5. The reporter’s record is the court reporter’s transcription of the oral proceedings occurring in the trial court, including evidence, arguments of counsel and rulings by the court. TEX. R. APP. P. 34.6(a).

In reviewing appellate complaints, the court of appeals is confined to the appellate record. It cannot consider matters which do not appear in the record. *See, e.g., Nelson v. Neal*, 787 S.W.2d 343, 346 (Tex. 1990); *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979).

Consequently, the specific appellate complaint must have been raised in a written request, objection, or motion included in the clerk’s record or in an oral request, objection, or motion transcribed by the court reporter and included in the reporter’s record. *See id.* Certain trial court requests must be made in writing (such as a motion to transfer venue) while others are almost always made orally (such as an objection to the admission of certain testimony). In either case, however, the trial lawyer must make certain the objection, request, or motion is a part of the appellate record. Oral requests or complaints that are not transcribed by the court reporter preserve nothing for review on appeal. An appellate court cannot consider documents attached as exhibits or appendices to the briefs, if those materials are not a part of the appellate record. *Mitchison v. Houston I.S.D.*, 803 S.W.2d 769, 771 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

B. The Court’s Ruling Must Appear in the Record

Just as any request for a ruling must appear in the record, so too the trial court’s ruling on the request must appear in the record in order to preserve a complaint for appellate review. But rule 33.1(c) states that “a signed separate order” is not required “to preserve a complaint for appeal” and rule 33.1(a)(2)(A) says that even an “implicit” ruling on the record is sufficient. A number of appellate courts have examined implicit rulings. *See, e.g. Gutierrez v. State*, 36 S.W.3d 509, 511 (Tex. Crim. App. 2001); *Krishnan v. Ramirez*, 42 S.W.3d 205, 220n.3 (Tex. App.—Corpus Christi 2001, pet. denied) (recognizing that “in general” the new rule has loosened the once mandatory requirement that an express ruling is necessary to preserve a complaint for appeal); *see also Hardman v.*

Dault, 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet.); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). As the Dallas Court of Appeals has noted, “[T]here is a split of authority whether . . . an objection to summary judgment evidence can be preserved by an implicit ruling without a signed written order,” which is something of an understatement. *Stewart v. Sanmina Te. L.P.*, 156 S.W.3d 198, 206-07 (Tex. App.—Dallas 2005, no pet.) (rejecting implied ruling striking evidence).

The *Krishnan* opinion takes the new rule about as far as it can go. In a case involving a stillborn fetus, the appellee’s lawyer struck a sensitive note in closing:

So, all of the mental anguish that has been testified about here, is mental anguish that she suffered as a result of the loss of the fetus as a part of her body. Because the courts have held that until the baby is born alive, it is not an individual.

42 S.W.3d at 221. After the appellant objected, the trial court said, “You may proceed.” *Id.* at 220 n.3. Although the trial court made no express ruling—and did not even acknowledge that an objection was lodged—the appeals court held that error was preserved. “It is apparent the trial court was aware of appellant’s objection and appellee’s response to the objection. By telling appellee to proceed following this exchange, the trial court implicitly overruled appellant’s objection. Thus, the issue was preserved for our review.” *Id.*

Another Corpus Christi opinion held that Rule 33.1 changes the requirement for a written order to complain about the trial court’s evidentiary rulings. The court relied on the reporter’s record of the summary judgment hearing:

Because we approve of the Frazier Court’s reasoning and its comparative analysis of rule 33.1(a) with former rule 52(a), we adopt its conclusions with respect to ruling on objections to evidence under the new rule. Accordingly, this Court concludes no written order overruling Columbia’s objections was necessary to preserve error, if the record indicates the trial court ruled on Columbia’s objections, either expressly or implicitly.

Columbia Rio Grande Regional Hosp. v. Stover, 17 S.W.3d 387, 395-96 (Tex. App.—Corpus Christi 2000, n.p.h.).

Yet appellate courts continue to enforce the need for written orders in summary judgment cases. *See, e.g., Chapman Children’s Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In the *Chapman* case, the appellants had tried to obtain a ruling on summary judgment affidavit objections, but had failed to secure a ruling before the summary judgment was granted:

Moreover, we find that the Trusts failed to preserve error on their objections to the form of the affidavits filed by Porter & Hedges. It is well settled that a party must obtain a ruling on an objection as to defects of an affidavit’s form or else the objection is waived. *See McConnell v. Southside I.S.D.*, 858 S.W.2d 337, 343 n. 7 (Tex.1993); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Here, the Trusts concede that, despite repeated efforts to do so, they were unable to obtain a written ruling on their formal objections from the trial court. After the summary judgment was granted, the Trusts scheduled a hearing on their objections. At that March 2, 1998 hearing, the trial court refused to rule on the objections, and so the Trusts lodged an objection to the court’s refusal to rule. We find that by failing to obtain a ruling or a refusal to rule on the hearsay objections until after summary judgment was granted, the Trusts did not preserve error. *See* TEX. R. APP. P. 33.1(a); *see also Dolcefino*, 19 S.W.3d at 926 (emphasizing that it remains “incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver”).

Regardless of the text of rule 33.1, it is much safer to obtain a signed, written order granting or denying the requested relief (except for rulings made on the record during trial). Moreover, you don’t have to wait for the statement of facts to be completed in order to evaluate the preservation of your appellate complaints.

C. Make Certain Your Request for Relief is Timely and Properly Raised

TEX. R. APP. P. 33.1 further requires that a request, objection, or motion must be “timely” and stated “with sufficient specificity to make the trial court aware of the complaint.” What constitutes “sufficient specificity” is not a precisely defined

concept, and as a rule, common sense should be a sufficient guide. “[T]imeliness” is another matter. Very often, timeliness is determined by strict legal rules applying to individualized complaints.

D. Oral Agreements Must Be Reduced to Writing, Signed and Filed

If you rely on an agreement with your opposing counsel rather than an order from the trial court, make certain the agreement is in writing, signed, and filed with the court. *See* TEX. R. CIV. P. 11. An appellate court will uphold an alleged agreement only if it meets the requirements of Rule 11 of the Texas Rules of Civil Procedure. *See Rabe v. Guaranty Nat’l Ins. Co.*, 787 S.W.2d 575, 580 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (alleged oral agreement granting a 45 day extension of time to respond to a motion for summary judgment did not comply with Rule 11 and was not sufficient).

E. Formal Bills of Exception

As a general rule, formal bills of exception are not required to preserve error. TEX. R. APP. P. 33.2 states that “[t]o complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.” Thus, formal bills of exception are used to make a record of complaints or other matters raised by a party and/or a trial court’s rulings thereon that do not appear in the reporter’s or clerk’s record. *See Fletcher v. Minnesota Mining & Manufacturing Co.*, 57 S.W.3d 602, 608-09 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). They cannot be used to raise matters or obtain rulings that were not before raised or made in a timely fashion. *Id.*

There is no particular form for a formal bill. TEX. R. APP. P. 33.2(a). The rule establishes the following requirements:

- (1) The formal bill must state the party’s objection and the trial court’s ruling. Those matters must be stated “with sufficient specificity to make the trial court aware of the complaint.” TEX. R. APP. P. 33.2(a).
- (2) The formal bill must be filed within 30 days after the filing party’s notice of appeal is filed. TEX. R. APP. P. 33.2(e)(1).
- (3) The trial court is required to submit the formal bill to the adverse party, and if it is agreed to, the trial judge must sign it and file it with the clerk. TEX. R. APP. P. 33.2(c)(2).
- (4) If the parties disagree, but the trial court judge finds the formal bill correct anyway, he must sign the bill and file it with the clerk; otherwise, if he finds it incorrect, the judge should suggest corrections as he deems necessary, and if the proponent agrees, the

trial judge shall sign it and file it with the clerk. TEX. R. APP. P. 33.2 (c)(2)(B)

- (5) If the proponent disagrees with the trial judge's bill, he may file a "bystander's bill." The proponent must obtain the signatures of three respectable bystanders who "observed the matter to which the bill is addressed," and file the "bystanders bill" with the clerk. This bill may then be controverted by opposing affidavits filed within 10 days after the filing of the bystanders bill. If both are filed, the "truth" is determined on appeal from the affidavits. TEX. R. APP. P. 33.2 (c)(3).

III. PLEADING REQUIREMENTS

Generally, we think of pleadings as the plaintiff's petition and the defendant's answer. While these certainly are pleadings, they are by no means the only pleadings a party can file. In fact, if the first pleading a defendant files is its original answer, that defendant has already waived certain complaints it might want to raise on appeal—specifically, a challenge to the court's exercise of personal jurisdiction over the defendant or a challenge to the venue.

A. The Special Appearance

A challenge to the trial court's exercise of jurisdiction over the person or property of the defendant is properly raised by filing a sworn special appearance. TEX. R. CIV. P. 120a. The special appearance must be filed before an answer on any other plea or motion. *Id.* Moreover, any other answer, plea, or motion must be made subject to the special appearance; and the special appearance must be ruled upon before any other plea or motion. *See, e.g., Liberty Enterprises v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985) (by filing a motion to set aside a default judgment and agreeing to the entry of an order granting the motion, the defendant waived its special appearance). A special appearance under Rule 120a can be waived even by challenging the service of process. Although a non-resident defendant, like any other defendant, may move to quash the citation for defects in the process, his only relief is additional time to answer rather than dismissal of the cause. A curable defect in service of process does not affect a non-resident defendant's amenability to service of process. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985). To emphasize the point, the supreme court holds that a party "does not waive" a special appearance challenging due process merely by challenging the method of service of process. *GFTA Trenanalysis v. Varme*, 991 S.W.2d 785, 786 (Tex. 1999).

Special appearances, like many other interlocutory orders of the trial courts, are now appealable by statute before a final judgment is rendered. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7); *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 713 (Tex. App.—Austin 2000, writ dismissed w.o.j.). Because these interlocutory rulings can be appealed, preservation requirements have become more imperative and immediate.

B. The Motion to Transfer Venue

An objection to improper venue (other than a motion to transfer because an impartial trial cannot be had in the county of suit) must be made by written motion filed before any other answer, plea, or motion. TEX. R. CIV. P. 86. As with the special appearance, any other answer, plea, or motion should be made expressly subject to the motion to transfer venue; and the motion to transfer should be ruled upon before any other plea or motion. *See, e.g., Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-11 (Tex. App.—Fort Worth 1988, writ denied) (defendant's actions in submitting and obtaining rulings on his withdrawal motion and his motion for new trial waived his motion to transfer venue).

Additionally, the movant has the duty to request a setting for the hearing on the motion to transfer venue. *See* TEX. R. CIV. P. 87; *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d at 309-10 (defendant waived his right to complain of the trial court's failure to grant his uncontested motion to transfer venue by failing to obtain a hearing and ruling on his motion). But *see also, Accent Energy Corp. v. Gillman*, 824 S.W.2d 274, 276-77 (Tex. App.—Amarillo 1992, writ denied) (despite a delay of nearly three years in securing a hearing, the defendants did not waive their motion to transfer venue in light of the plaintiffs' repeated amendments to their pleadings and the continuance of at least one scheduled venue hearing).

Two cases emphasize that choice of venue belongs to plaintiffs. Only if a plaintiff fails to meet the burden to show venue is permissible in the county of suit may the trial judge transfer venue. "If the plaintiff's venue choice is not properly challenged through a motion to transfer venue, the propriety of venue is fixed in the county chosen by the plaintiff." *Wilson v. Texas Parks & Wildlife Dept.*, 886 S.W.2d 259, 260 (Tex. 1994), on remand, 991 S.W.2d 93 (Tex. App.—Austin 1999), rev'd, 8 S.W.3d 634 (Tex. 1999). On appellate review of a trial court's venue ruling, the test is legal sufficiency of the evidence, and the record is reviewed "in the light most favorable to the trial court's ruling." *Ruiz v. Conoco*, 868 S.W.2d 752, 757-58 (Tex. 1993).

C. Petitions and Answers

1. Each independent ground of recovery must be pleaded

As a general rule, a party’s pleadings are liberally construed. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000). Nonetheless, every independent ground of recovery must be specifically pleaded. See TEX. R. CIV. P. 47; TEX. R. CIV. P. 301 (“The judgment of the court shall conform to the pleadings . . .”). For example, alter ego and each of the other bases for disregarding the corporate fiction is an independent ground of recovery which must be specifically pleaded or it is waived. See *Mapco Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991); *Castleberry v. Branscum*, 721 S.W.2d 270, 272, 275 n. 5 (Tex. 1986). Quantum meruit is a separate theory of recovery which must be specifically pleaded. See *Centex Corp. v. Dalton*, 840 S.W.2d 952, 959 (Tex. 1992). Likewise, a request for prejudgment interest must be specifically pleaded. *Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987).

2. Matters of avoidance and affirmative defenses must be specifically pleaded

Unlike many jurisdictions, Texas permits a party to answer by way of a general denial. TEX. R. CIV. P. 92. The affect of a general denial is to put in issue those matters pleaded by the adverse party. *Id.* A general denial is not sufficient, however, to raise (or preserve) affirmative defenses or certain defenses that must be verified. See TEX. R. CIV. P. 92, 93, 94.

Rule 93 of the Texas Rules of Civil Procedure lists those pleas that must be verified. They include the following:

1. A plea that the plaintiff or the defendant lacks the legal capacity to sue or be sued;
2. A plea that the plaintiff is not entitled to recover in the capacity in which she sues;
3. A plea that the defendant is not liable in the capacity in which he has been sued;
4. A plea that there is another suit pending between the parties;
5. A plea that there is a defect of parties;
6. A denial of partnership, incorporation, or doing business under an assumed name;
7. A denial of the execution of a written instrument upon which any pleading is founded;
8. A denial of the genuineness of an endorsement or assignment of a written instrument upon which suit is brought;
9. A plea that a written instrument upon which a suit is founded is without consideration;

10. A denial of an account;
11. A plea that a contract sued upon is usurious;
12. A plea that notice and proof of loss or claim for damage has not been given as alleged; and
13. Certain matters in a worker’s compensation case.

TEX. R. CIV. P. 93. As the supreme court has pointed out, “We have not hesitated in previous cases to hold that parties who do not follow rule 93’s mandate waive any right to complain about the matter on appeal.” *Nootsie, Ltd. v. Williamson Cty. Appr. Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (construing Rule 93 (1) requirement for verified denials).

In addition to those defenses that must be verified, Rule 94 of the Texas Rules of Civil Procedure requires that any matter constituting an avoidance or affirmative defense must be specifically pleaded. Those matters include: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. TEX. R. CIV. P. 94. Additionally, immunity, including a claim of governmental immunity, is an affirmative defense that must be pleaded or it is waived. *Davis v. City of San Antonio*, 752 S.W.2d 518, 519-20 (Tex. 1988). In most circumstances, federal preemption is an affirmative defense that must be specifically pleaded. *Gorman v. Life Ins. Co. of North Am.*, 811 S.W.2d 542, 546 (Tex. 1990). The discovery rule, and any other matter in avoidance of the statute of limitations, is an affirmative defense that must be specifically pleaded. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988). Likewise, any matter seeking to avoid enforcement of a contract—such as lack of conspicuousness, failure to meet the express negligence test, failure of essential purpose, and unconscionability—must be specifically pleaded. See, e.g., *Forest Lane Porsche Audi Assocs. v. G&K Services, Inc.*, 717 S.W.2d 470, 474 (Tex. App.—Fort Worth 1986, no writ); *Delta Engineering Corp. v. Warren Petroleum, Inc.*, 668 S.W.2d 770, 773 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); *Copeland Well Service v. Shell Oil*, 528 S.W.2d 317, 319-21 (Tex. Civ. App.—Tyler 1975, writ dismissed); *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 669 (Tex. Civ. App.—Amarillo 1977, no writ) (failure of essential purpose).

3. Pleadings must be amended timely

Parties may amend their pleadings, without obtaining leave of court, anytime more than seven days before trial—unless the court has set an earlier date pursuant to Rule 166. TEX. R. CIV. P. 163, 166. The cut-off date is seven days before the date the case is set for trial, not the date trial actually begins. See *J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 108 (Tex. App.—Dallas 1990, no writ). “In computing any period of time prescribed or allowed by [the Texas Rules of Civil Procedure] . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included.” *Sosa v. Central Power & Light Co.*, 909 S.W.2d 893, 895 (Tex. 1995). Therefore, for a pleading filed under Rule 63, “the day on which the . . . amendment [is filed] is not counted but the seventh day after it was filed is counted,” and the last day counted may be the day of the hearing. *Id.* An amendment must be permitted when it is offered post-trial, in an effort to conform the pleadings to the jury’s verdict on damages. *Greenhalgh v. Service Lloyd’s Ins. Co.*, 787 S.W.2d 938, 940 (Tex. 1990). No discretion exists for a trial court to refuse an amendment “unless (1) the opposing party presents evidence of surprise or prejudice . . . ; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face” *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992).

Given these pleading requirements, the trial lawyer should review the latest amended pleadings of all parties at least two weeks before the date a case is set for trial. Think about the evidence and legal arguments you expect to offer. Think about the jury questions and instructions you intend to request. Think about the judgment you want to obtain. Every theory of recovery, every matter in avoidance, every argument, every jury question, and all the relief you seek should be supported by your pleadings. If it isn’t, or you aren’t sure, amend more than seven days before the case is set for trial.

IV. JURY DEMANDS AND PAYMENT OF THE JURY FEE

Not every case should be tried to a jury—but this tactical decision should not be dictated by a party’s failure to timely and properly demand a jury trial. A proper jury demand requires both a written request and the payment of a fee. TEX. R. CIV. P. 216. See also *Forscan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 392 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed) (party’s payment of the jury fee accompanied by a transmittal letter enclosing “our firm check in the

amount of \$10.00 which represents the jury fee for the above referenced cause” did not comply with the requirement that a written request for a jury be made; consequently, the party waived its right to a jury trial).

The written request for a jury trial must be filed and the fee paid “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” TEX. R. CIV. P. 216(1). When the written request is filed and the fee paid more than thirty days before the case is set for trial, there is a presumption that the jury demand was made within a reasonable time. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991). The adverse party may rebut this presumption only by showing that the granting of a jury trial would cause it injury, disrupt the court’s docket, or impede the ordinary handling of the court’s business. *Id.*

Even when a party does not timely pay the jury fee, a trial court should afford a party the right to a jury trial if it can be done without interfering with the court’s docket, delaying the trial, or injuring the opposing party. See *Dawson v. Jarvis*, 627 S.W.2d 444, 446-47 (Tex. App.—Houston [1st Dist.] 1981, writ refused n.r.e.); *Childs v. Reunion Bank*, 587 S.W.2d 466, 471 (Tex. Civ. App.—Dallas 1979, writ refused n.r.e.); *Aronoff v. Texas Turnpike Auth.*, 299 S.W.2d 342, 344 (Tex. Civ. App.—Dallas 1957, no writ); *Erback v. Donald*, 170 S.W.2d 289, 294 (Tex. Civ. App.—Fort Worth 1943, writ refused w.o.m.). See also *Allen v. Plummer*, 71 Tex. 546, 9 S.W. 672, 673 (1888) (“[T]he failure to make [a timely jury fee payment] does not forfeit the right to have a trial by jury when such failure does not operate to the prejudice of the opposite party.”). When a trial is designed to be tried piecemeal, in start-and-stop fashion, and the court crafts the proceedings to make the jury fee late, the trial court may be subject to mandamus for refusing to allow a jury trial, despite late payment of the jury fee. See *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997).

Rule 245 of the Texas Rules of Civil Procedure was amended in 1990 to require that the parties be given at least 45 days notice of a first trial setting. The stated purpose for this amendment was “to harmonize a first time non-jury setting with the time for jury demand, and to set a more realistic notice for trial.” TEX. R. CIV. P. 245 (comment to 1990 change). Take advantage of this amendment. Immediately upon learning that a case has been set for trial, the trial counsel should obtain a file-stamped copy of the jury request and a copy of the paid jury fee receipt. If either of these documents cannot be located in the file, file a written request and/or pay the required fee more than 30 days before the date the case is set.

V. DISQUALIFICATION AND RECUSAL OF JUDGES

Although treated similarly in the Texas Rules of Civil Procedure, disqualification and recusal are not synonymous terms. The exclusive grounds for disqualification are expressly set out in the Texas Constitution. *See* TEX. CONST. art. V, § 11. As established by the Constitution, a judge is disqualified from sitting in a case where (1) the judge is interested in the outcome of the case; (2) the judge is related to a party in the case by affinity or consanguinity within the third degree; and (3) the judge has acted as a counsel in the case. *Id.* *See also* TEX. R. CIV. P. 18b(1). If a judge is disqualified under the constitution, she is absolutely without jurisdiction in the case, and any judgment rendered by her is void, without effect, and subject to collateral attack. *See Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 202 S.W.2d 218, 220 (Tex. 1947); *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977).

The grounds for recusal are enumerated in Rule 18b (2) of the Texas Rules of Civil Procedure. In part that rule requires that a trial judge “shall” recuse herself in any proceeding in which her impartiality might reasonably be questioned; she has a personal bias or prejudice concerning the subject matter or a party; or she has personal knowledge of disputed evidentiary facts concerning the case. TEX. R. CIV. P. 18b(2). Recusal is not jurisdictional. A recusal motion must be filed “[a]t least ten days before the date set for trial or other hearing . . .” and it must be verified. TEX. R. CIV. P. 18a(a). A party waives complaints of a trial judge’s failure to recuse herself by not raising the issue by a timely, proper motion. *See, e.g., Watkins v. Pearson*, 795 S.W.2d 257, 260 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Coven v. Heatley*, 715 S.W.2d 739, 742 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.). Nonetheless, “[w]here the movant in a motion to recuse does not receive 10 days notice of the hearing on the matter from which he seeks to recuse the judge, the 10-day requirement of rule 18a(a) cannot apply.” *Metzger v. Sebeck*, 892 S.W.2d 20, 49 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

VI. DISCOVERY COMPLAINTS

It is beyond the scope of this paper to address all of the pitfalls and preservation traps inherent in propounding and responding to discovery requests. As a general rule discovery complaints—other than complaints relating to the imposition of sanctions—find their way into an appeal as complaints regarding the admission or exclusion of evidence. Preservation of these complaints is discussed in section VII.

Nonetheless, one preservation requirement is worth discussing. If you find yourself in a discovery or sanctions battle, be certain to have the trial court hearing recorded by the court reporter. Should you find yourself on the losing end of such a battle and want to mandamus or appeal, you must have a record of the hearing—otherwise, the appellate court will presume that evidence presented at the hearing supported the trial court’s order. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 837 and n.3 (Tex. 1992) (“Since an evidentiary hearing was held, the Walkers had the burden of providing us . . . a statement of facts from the hearing”); *Meuth v. Hartgrove*, 811 S.W.2d 626, 627 (Tex. App.—Austin 1990, no writ) (“In the absence of a record of the evidentiary hearings, this court presumes that the omitted proof supports the order”); *McFarland v. Szakalun*, 809 S.W.2d 760, 764 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (“When the record is incomplete, we must assume that the portion omitted supports the correctness of the trial court’s judgment”).

One additional note concerns the exclusion of witnesses who were not timely identified in response to an appropriate interrogatory requesting the identity of all persons with knowledge of relevant facts. If a party fails to identify a witness more than thirty days before trial, the witness cannot be called to testify. *See, e.g., Sharp v. Broadway Nat’l Bank*, 784 S.W.2d 669, 670-71 (Tex. 1990); *Gee v. Liberty Mut. Ins. Co.*, 765 S.W.2d 394, 395 n.2 (Tex. 1989). The sanction is automatic. *Id.* The only exception to this rule exists when the party offering the witness demonstrates, on the record, good cause for allowing the testimony and the trial judge finds, on the record, that good cause exists. *Gee v. Liberty Mut. Ins. Co.*, 765 S.W.2d at 395-96. The new discovery rules carry through this punishment, unless the proponent of the evidence offered can prove either:

- (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
- (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

TEX. R. CIV. P. 193.6(a). The burden of establishing that one of these exceptions applies rests on the party seeking to introduce the evidence or call the unrevealed witness. TEX. R. CIV. P. 193.6(b). In the event that the party seeking to introduce such evidence cannot meet that burden, the trial court is given the express right to grant a continuance.

VII. EVIDENTIARY MATTERS

Evidentiary errors come in two basic varieties: improperly excluded evidence and improperly admitted evidence. The steps necessary to preserve error in each circumstance are somewhat different, although certain requirements are the same in either case.

A. A Motion in Limine Does Not Preserve Error

1. In general, a pre-trial ruling in limine preserves nothing.

It has been said many times: a ruling on a motion in limine preserves nothing. A party cannot predicate its complaint *on* appeal (concerning the admission or the exclusion of evidence) on a motion in limine. *E.g., Methodist Hospitals of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, no writ). One emphatic statement of this rule is, “A ruling on a motion in limine is a tentative ruling and preserves nothing for appeal. To preserve a complaint regarding the exclusion of evidence, the complaining party must actually offer the evidence during the trial and secure an adverse ruling from the court.” *Owens v. Perez*, 158 S.W.3d 96, 108 (Tex. App.—Corpus Christi 2005, no pet.). Therefore, if a motion in limine is denied, the party opposing the introduction of the evidence must still object at the time the evidence is offered. *E.g., Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 872, 855 (Tex. App.—Beaumont 1987, no writ). If a motion in limine is granted, the party seeking the introduction of the evidence must still make an offer of the evidence on the record. *E.g., Commercial Ins. Co. v. Lane*, 480 S.W.2d 781, 783-84 (Tex. Civ. App.—Dallas 1972, writ ref’d n.r.e.). And when the proponent of the evidence seeks to introduce evidence despite the trial court’s ruling on the motion in limine, the party opposing the evidence must still object. *E.g., Pool v. Ford Motor Co.*, 715 S.W.2d 629, 637 (Tex. 1986).

There are obviously reasons why a lawyer may wish to raise evidentiary matters in a motion in limine. Irrespective of the trial court’s ruling, do not rely upon it to preserve error—it does not preserve anything. There is one slight modification of this emphatic rule, and the modification depends upon proving that a trial court’s pre-trial ruling is “definitive.” Unfortunately, as the following shows, “definitive” is not a definite term that is defined in the rules. Both state and federal case law must await the term’s elaboration.

The Federal Rules of Evidence were amended effective December 1, 2000 to make certain objections unnecessary at trial, if a pre-trial “definitive” ruling is obtained. That rule provides:

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

FED. R. EVID. 103. When ambiguity exists about a ruling, the ruling is not “definitive,” and it would preserve nothing. This was the law, even in federal courts, prior to the change. *See C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 699 (5th Cir. 2001). Even under the amended rule, if circumstances change from the pre-trial “definitive” ruling, then a renewed objection would be required. As the federal advisory committee notes:

Even where the court’s ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) (“objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted.”).

See Federal Advisory Committee Note to the 2000 Amendment to Rule 103.

In Texas, there are numerous instances when an advocate must re-urge objections despite a prior “definitive” ruling. *See, e.g., Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex.1989) (pretrial motion for sanctions, which trial court denied, failed to preserve error when court permitted undisclosed witness to testify; party must object to testimony at trial to preserve error); *Hartford Accident & Indem. Co. v.*

McCardell, 369 S.W.2d 331, 335 (Tex.1963) (if motion in limine is overruled, to preserve error, party must object when question is asked or evidence is offered during trial); *Ludlow v. DeBerry*, 959 S.W.2d 265, 270 (Tex. App.—Houston [14th Dist.] 1997, no writ) (when trial court excludes party's evidence, party must make offer of proof to preserve error and to permit the trial court to reconsider its ruling); *Cliffs Drilling Co. v. Burrows*, 930 S.W.2d 709, 712 (Tex. App.—Houston [1st Dist.] 1996, no writ) (party must re-urge its motion for directed verdict at close of all the evidence when trial court denies the motion during trial). To borrow the Texas Supreme Court's reasoning, "Parties in any instance should not assume that the trial court is incapable of recognizing an error in a previous [ruling]...." *Clark v. Trailways, Inc.*, 774 S.W.2d at 647.

The courts seem more than willing to give the trial judge a second chance, even to the point of requiring a trial lawyer to repeat arguments that were not successful before. *United Parcel Service, Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916-17 (Tex. App.—Houston [14th Dist.] 2000, writ denied). Consequently, a smart lawyer would be wise to repeatedly object or re-urge the offer of excluded evidence.

2. Motions in limine are not a safe way to preserve Daubert/Robinson challenges.

As discussed above, in section VII-A, motions in limine are limited tools of error-preservation. In *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998), the supreme court held: "To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered." (emphasis added). But as Justice Hecht noted in dissent, "[h]ow one objects to evidence before trial is not entirely clear." *Id.* at 402. In *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-05 (Tex. App.—Texarkana 2000, pet. denied), the court distinguished "between a motion in limine and a pretrial ruling on admissibility," and concluded that while motions in limine preserve nothing for appeal, the plaintiff's pretrial motion "to exclude evidence" was a sufficient means of preserving their complaint regarding the admission of certain expert testimony. This distinction has been recognized by other courts, but not always with a finding that the specific complaint was preserved. *E.g., Norfolk Southern Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, n.p.h.). Later, the supreme court has "recognized that an objection to the admissibility of the expert testimony may not be needed to preserve every

no-evidence challenge" *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.* 136 S.W.3d 227, 233 (Tex. 2004) (noting "a distinction between challenges to an expert's scientific methodology and no evidence challenges where, on the face of the record, the evidence lacked probative value . . .").

The moral of the story is, be careful. Do not raise *Daubert/Robinson* challenges in a document labeled a motion in limine. Obtain a written, "definitive" ruling expressly granting or denying your pretrial motion to exclude, and then raise your challenge again when the witness is called to testify.

B. Preservation of Error Relating to the Erroneous Admission of Evidence

Rule 103 (a)(1) of the Texas Rules of Civil Evidence specifically requires "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context." The failure to object waives any complaint regarding the improper admission of evidence. *Crumpton v. Stevens*, 936 S.W.2d at 473, 478 (Tex. App.—Fort Worth 1996, no pet.); *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 736 (Tex. App.—Texarkana 1996, no pet.).

1. The objection must be made by the complaining party

Generally, a party must make its own objection to the admission of evidence in order to preserve a complaint for appeal. *See Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, no writ). A party cannot rely upon an objection made by another party, even if that other party is on the same side of the suit, i.e., a co-defendant. *Id.* An exception to this rule exists, however, when the parties expressly agree, and the trial court expressly accepts, that an objection by one party will preserve error for all the parties on that side of the suit. *Id.*

2. The objection must be specific

In order to preserve error, the complaining party must state the specific grounds for his objection. TEX. R. EVID. 103(a)(1). *See Dalworth Trucking Co. v. Bulen*, 924 S.W.2d at 736. A specific objection is "one which enables the trial court to understand the precise grounds so as to make an informed ruling, affording the offering party an opportunity to remedy the defect, if possible." *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989). The objection should both identify the objectionable part of the question or answer and identify the rule the court would violate by admitting the evidence. *Haney v. Purcell Co.*, 796 S.W.2d 782, 789 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

When the offered evidence is admissible for a limited purpose, it is particularly important that any objection be specifically directed at the objectionable portion of the evidence. If the objectionable portion of the evidence is separable from the unobjectionable, an objection to the evidence in its entirety is properly overruled. *See Cherokee Water Co. v. Gregg Cty. Appraisal Dist.*, 773 S.W.2d 949, 959 (Tex. App.—Tyler 1989), *aff'd*, 801 S.W.2d 872 (Tex. 1990). *See also Speir v. Webster*, 616 S.W.2d 617, 619 (Tex. 1981). This requirement of specific objections can be especially tricky when summaries of voluminous records are offered. *See Uniroyal Goodrich Tire Co. v. Martinez*, 928 S.W.2d 64, 74 (Tex. App.—San Antonio 1995), *aff'd*, 977 S.W.2d 328 (Tex. 1998) (trial court did not abuse its discretion in admitting time line prepared by witness to illustrate the sequence of events to which he had already testified). Although such charts and graphs are generally admissible, if small parts of the chart or summary contain inadmissible evidence, the objecting party must point out the objectionable aspect of the evidence. The objecting party must also ask the trial court to instruct the jury to consider the evidence only for the proper or limited purpose. TEX. R. EVID. 105.

3. The objection must be timely—not too early, not too late

Not only must the objection be specific, it must be made timely. To be timely, the objection must be made at the time the evidence is offered, not after it has been introduced. *Boyer v. Scruggs*, 806 S.W.2d 941, 946 (Tex. App.—Corpus Christi 1991, no writ). But beware! The objection must also not be made too early. For example, in *Bushnell v. Dean*, 803 S.W.2d 711 (Tex. 1991), the plaintiff’s expert “indicated that he was going to give a working definition of sexual harassment, including general things that are true about a person who harasses.” At that point, the defendant’s counsel objected:

I am objecting to the testimony of this expert witness as a whole to the extent that it goes to questions of profile of someone who harasses. . . I think it is likely to create a great deal of prejudice and to confuse the jury and issues that they actually have to decide in this case, and that involves a mixture of law and fact.

Id. at 712. The trial court responded that it was concerned the witness’s testimony might at some point cross the line into impermissible character evidence, and instructed the defense attorney to re-urge his objection at that point in time. *Id.* The defendant’s

attorney never made any further objection, and the supreme court held that any complaint regarding the evidence that ultimately came in had been waived. *Id.*

As to the timing of an objection, counsel must also remember that the admission of similar evidence without objection, either before or after an objection is made, waives any error concerning the admission of the complained of improper evidence. *See Port Terminal R.R. Ass’n v. Richardson*, 808 S.W.2d 501, 510 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, no writ).

4. The running objection

a. The necessity of renewing objections

There are two lines of authority regarding the need to renew objections. *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113-14 (Tex. App.—Fort Worth 1988, writ denied) (recognizing two lines of authority). One line of cases holds that “[w]here a party makes a proper objection to the introduction of testimony and is overruled, he is entitled to assume that the judge will make the same ruling as to the other offers of similar testimony, and he is not required to repeat the objection.” *Burnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 295 (Tex. Civ. App.—Amarillo 1978, no writ); *Crispi v. Emmott*, 337 S.W.2d 314, 318 (Tex. Civ. App.—Houston 1960, no writ). Another line of authority has concluded “[a]lthough an objection to evidence is made and overruled, it must be repeated if similar evidence is subsequently sought to be introduced, or the objection will be waived . . . or the trial court’s [error will be] . . . deemed harmless.” *Badger v. Symon*, 661 S.W.2d 163, 165 (Tex. App.—Houston [1st Dist.] 1983, writ *ref’d n.r.e.*); *City of Houston v. Riggins*, 568 S.W.2d 188, 190 (Tex. Civ. App.—Tyler 1978, writ *ref’d n.r.e.*); *Kelso v. Wheeler*, 310 S.W.2d 148, 150 (Tex. Civ. App.—Houston [1st Dist.] 1958, no writ).

The two lines of authority do not appear to be reconcilable. However, the Texas Supreme Court recently has allowed preservation of error through a specific running objection, noting that the party “clearly identified the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury Hence the running objection preserved the complaint” *Volkswagen of Am. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). From a technical standpoint, however, renewing objections represents the more prudent course for trial counsel. That tactic, however, ignores a crucial, practical consideration: the potential for alienating the trial judge and the jurors by constantly objecting. Trial lawyers must balance these tactical considerations.

b. Conflicting statements about the use of running objections

Several Texas courts in civil cases have assumed, without discussion, that running objections adequately preserve complaints for appellate review. *See, e.g., Rural Dev. Inc. v. Stone*, 700 S.W.2d 661, 667 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.); *Price v. Gulf Atl. Life Ins. Co.*, 621 S.W.2d 185, 188 (Tex. Civ. App.—Texarkana 1981, writ ref’d n.r.e.); *Frobese v. Anderson*, 487 S.W.2d 818, 821 (Tex. Civ. App.—Texarkana 1972, no writ). Former Chief Justice Jack Pope has written that such objections preserve error for appellate review. *Pope & Hampton, Presenting and Excluding Evidence*, 9 TEX. TECH L. REV. 403, 447 (1978). Likewise, the Dallas court has concluded that a clear, specific running objection to certain evidence in the bench trial of a civil matter will preserve error. *See Commerce, Crowds & Canton v. DKS Constr. Inc.*, 776 S.W.2d 615, 620 (Tex. App.—Dallas 1989, no writ). Now, the Texas Supreme Court has permitted a party to preserve error through the use of a running objection, with loaded-up specifics apprising the trial judge of the complaint. *Volkswagen of Am. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).

The Texas Court of Criminal Appeals, en banc, has criticized the running objection on the grounds that this doctrine “certainly conflict[s]” with Texas law that the erroneous admission of proof is cured when similar evidence comes in elsewhere without objection, and is contrary to the rule that a party must object each time inadmissible evidence is offered. *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985) (en banc). However, later Texas criminal cases have embraced the use of running objections. “[A]s long as the running objection constituted timely objection, stating the specific grounds for the ruling, the movement desired the court to make (if the specific grounds were not apparent from the context of the running objection) then the error should be deemed preserved by an appellate court.” *Ex parte McKay*, 819 S.W.2d 478, 489 (Tex. Crim. App. 1990); *see also Sattiewhite v. State*, 786 S.W.2d 271 (Tex. Crim. App. 1989).

c. Limitations on use of running objections

Running objections ordinarily relate to only a single witness. *In the Interest of A.P.*, 42 S.W.3d 248, 260 (Tex. App.—Waco 2001, n.p.h.). The extent to which a running objection may cover testimony of subsequent witnesses depends on an analysis of several factors: (1) the nature and similarity of the subsequent testimony to the prior testimony, (2) the proximity of

the objection to the subsequent testimony, (3) whether the subsequent testimony is from a different witness, (4) whether a running objection was requested and granted, and (5) any other circumstances which might suggest why the objections should not have to be re-urged. *Id.*; *Correa v. General Motors Corp.*, 948 S.W.2d 515, 518-19 (Tex. App.—Corpus Christi 1997, no writ).

In Texas civil cases, running objections are subject to so many qualifications that counsel must proceed carefully. The supreme court went out of its way to note the specificity and detail of the complaint mentioned in the running objection in the *Volkswagen v. Ramirez* case, which emphasized that both the source of the offending evidence and the subject matter of the objectionable evidence was contained in the prior objection. 159 S.W.3d at 907. Because the trial court does not have to grant a running objection (and it may not preserve error in any event), a party should carefully weigh the request for a running objection against the risk of alienating jurors and the trial judge with repeated objections. There is, unfortunately, no clear answer.

5. Obtain a ruling

No matter how good the objection, to preserve any complaint for appeal, counsel must obtain a ruling on the objection. *Sanchez v. Brownsville Sports Center, Inc.*, 51 S.W.3d 643, 661-62 (Tex. App.—Corpus Christi 2001, no. pet.); *see section II-B, above* (discussing implied or implicit rulings). However, if the trial court refuses to rule, an objection to the court’s refusal to rule will preserve error. TEX. R. APP. P. 33.1 (a)(2)(B); *see generally Wal-Mart Stores v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999). Sometimes, a ruling that grants different relief from that requested in the objection will preserve error. *Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997) (granting a motion to disregard jury answers obviated the need of a ruling on motion to conform pleadings to the jury’s verdict).

C. Preservation of Error Relating to the Erroneous Exclusion of Evidence

While a proper objection will preserve a complaint regarding the admission of improper evidence, Rule 103(a)(2) provides that a ruling excluding evidence is not reversible error in the absence of an offer of proof. Without an offer of proof that informs the trial judge of the substance, purpose, and relevance of the excluded evidence, any complaint regarding the exclusion of evidence is waived. *See, e.g., Fletcher v. Minnesota Mining & Manufacturing Company*, 57 S.W.3d 602, 606-607 (Tex. App.—Houston [1st Dist.] 2001, no. pet.).

1. The offer of proof need not be in question and answer form unless a party objects

The offer of proof need not be in question and answer form. TEX. R. EVID. 103(b); TEX. R. APP. P. 33.2(a) (“No particular form of words is required in a bill of exception.”). Instead, the offering party must make the “substance of the evidence . . . known to the court by offer,” unless it was apparent from the context in which the questions were asked. TEX. R. APP. P. 103(a)(2). The offering party need only ensure that the trial court is fully aware of the substance of the evidence sought to be admitted. *See Jones v. Kinder*, 807 S.W.2d 868, 871 (Tex. App.—Amarillo 1991, no writ). The current evidence rule replaces TEX. R. APP. P. 52(b), which had been the place offers of proof were contained in the rules. Now, as the evidence rule states, “The court may, or at the request of a party shall, direct the making of an offer of proof in question and answer form.” TEX. R. EVID. 103(b).

An offer of proof should state the names of witnesses and identify writings with particularity, state with specificity the testimony to be given by the witnesses and the content of the writings, and state the relevance of the evidence. When a party objects to this narrative format, however, the trial court “shall” direct that the offer be made in question and answer form (a bill of exception). TEX. R. EVID. 103(b).

Courts have considered error in the exclusion of a witness when the substance of the witness’s testimony was apparent from the context. One court has examined a complaint that an expert was excluded impermissibly, because the import of the expert’s testimony was apparent from the motion to strike hearing. *Akin v. Santa Clara Land Co.*, 34 S.W.2d 334, 339 (Tex. App.—San Antonio 2000, writ denied) (“It is apparent from the record of the hearing on the motion to strike that the trial court believed Bliss was being offered to testify regarding his interpretation of the terms of the lease agreement.”).

However, most courts still recite the tried-and-true rules on error preservation in the exclusion of evidence:

To preserve the error of a trial judge in excluding evidence, a party must do certain things. The party must: (1) attempt during the evidentiary portion of the trial to introduce the evidence, *Estate of Veale v. Teledyne Industries, Inc.*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied); (2) if an objection is lodged, specify the purpose for which it is offered and give the trial judge reasons why the evidence is admissible, *Id.*; (3) obtain a

ruling from the court, *Id.*; and (4) if the judge rules the evidence inadmissible, make a record, through a bill of exceptions [formal or informal], of the precise evidence the party desires admitted. *Id. See also Spivey v. James*, 1 S.W.3d 380, 385 (Tex. App.—Texarkana 1999, pet. denied).

Richards v. Comm’n for Lawyer Discipline, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, n.p.h.). The careful practitioner will follow the traditional rules.

2. The offer of proof must be made timely

An offer of proof need not be made precisely at the time the trial court refuses to admit evidence, but the offer must be made during the evidentiary portion of the trial, and “before the court’s charge is read to the jury.” TEX. R. EVID. 103(b); *Rawhide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied); *see also Lakeway Land Co. v. Kizer*, 796 S.W.2d 820, 827 (Tex. App.—Austin 1990, writ denied). The trial court has no discretion to deny the offering party an opportunity to make an offer of proof concerning excluded evidence. *Ledisco Fin. Serv., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. Civ. App.—Texarkana 1976, no writ).

3. Counsel must obtain a ruling demonstrating the trial court’s exclusion of the evidence

Of course, before an offer of proof becomes necessary, the trial court must first have refused to admit certain evidence. The trial court’s ruling excluding the evidence must be reflected in the record. *See Jones v. Kinder*, 807 S.W.2d 868, 871 (Tex. App.—Amarillo 1991, no writ); *O’Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.). If the court reporter’s certified transcription of the hearing shows the nature of the evidence offered (whether by narrative statement or question and answer), the specific objection, and the trial court’s ruling, a formal bill of exception is not required. If the reporter’s record does not contain the offer of proof or the trial court’s ruling, the issue may be preserved for appeal by filing a formal bill of exception.

4. When to use a formal bill of exception

If the court reporter’s certified transcription of the hearing shows the nature of the evidence offered (whether by narrative statement or question and answer), the specific objection, and the trial court’s ruling, a formal bill of exception is not required. *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

If the reporter's record does not contain the offer of proof or the trial court's ruling, the issue may be preserved for appeal by filing a formal bill of exception. *See* TEX. R. APP. P. 33.2.

VIII. LEGAL ISSUES TO CONFRONT BEFORE THE VENIRE ARRIVES

Preservation of error also impacts jury selection. Consideration must be given to alternatives that are exercised once your case is called for trial but before voir dire examination actually starts. Serious time should be spent before trial in deciding whether to use any of these alternatives, and you must have familiarity with the local procedures of the court and the judge. It is helpful to discuss these options with opposing counsel to flesh out any opposition.

A. Motions to Extend Time for Voir Dire

Attorneys should be allowed broad latitude on the subject matter covered in voir dire so that peremptory challenges may be intelligently exercised. *Texas Emp. Ins. Ass'n v. Loesch*, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco, 1976, writ ref'd n.r.e.) The right to broad voir dire questioning is based on the fundamental right to trial by a fair and impartial jury, guaranteed by the Texas Constitution. *See Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). Both Texas law and the United States Constitution make jurors the sole judges of the credibility of witnesses and the weight to be given the evidence. U.S. CONST. amend. VIII; TEX. CONST. art. I, § 15 (Interpretive Commentary) (Vernon 1997); *Leyva v. Pacheco*, 358 S.W.2d 547, 549 (Tex. 1962). Indeed, Rule 226a, in instructions approved by the supreme court, tells the jury, “you are the sole judges of the credibility of the witnesses and the weight to be given their testimony . . .” TEX. R. CIV. P. 226a. Although trial courts generally have broad discretion in the scope of voir dire, unreasonable limitations of time or scope may be violative of a litigant's right to a full and complete voir dire. One old Texas case upheld an allowance of 45 minutes for voir dire, given that the trial judge warned counsel he was running out of time and granted an additional ten minutes. *Roy v. State*, 627 S.W.2d 488, 490 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

When a trial judge commits error and forbids a reasonable time to make an intelligent voir dire exam possible, an advocate may wish to file a motion to extend voir dire examination. But such a complaint might not preserve error if the motion fails to explain why the increased time is necessary.

To explain why, the motion to extend time for examination of the jury panel should provide detail. This should include what areas of inquiry are absolutely necessary, the particular reasons why extended examination should be permitted in your case, and the reason that each area of inquiry is material. If the question proposed is not relevant to the parties or the issues in the particular case on trial, it may be disallowed. *Johnson v. Reed*, 464 S.W.2d 689, 691 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.). In any event, unless a careful record is made, it will be difficult to show harmful error without detailing how material areas of inquiry were cut off, and how that foreclosed your rights. TEX. R. APP. P. 44 (a) (no judgment will be reversed unless the error either prevented the appellant from properly presenting its appellate argument, or the error probably caused the rendition of an improper judgment.).

Counsel should get a ruling on the motion to extend time before voir dire examination begins. But once is not enough. To insure that a record has been preserved for appeal, counsel should repeat the request for more time when and if the judge cuts off time, and she should show on the record that the time allocated by the judge is up and that more legitimate areas of questions remain to be put to the jury panel. Also, the record probably should reflect that the time limitation imposed by the court prevented the attorney from making an informed use of peremptory challenges, and the record should also include an offer of proof showing which questions and areas of inquiry were prohibited because of a lack of time. TEX. R. APP. P. 33.2; *see also Babcock*, 767 S.W.2d at 707. Of course, if an adequate motion to extend time for voir dire examination has been made, then the list of questions requested (but disallowed by the trial judge) will already be a matter of record, either dictated to the court reporter or contained in the written motion.

B. Jury Shuffles

The Texas Rules of Civil Procedure provide for a jury shuffle “upon the demand prior to voir dire examination by any party or attorney in the case.” TEX. R. CIV. P. 223. Since 1990, “there shall be only one shuffle and drawing by the trial judge in each case.” *Id.* This means the *case* gets one shuffle—not one shuffle per side or per party. Whether and when a shuffle should be requested is largely a question of the particular case, county, and make up of the venire panel. *See generally, Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex. App.—Austin 1993, writ denied).

C. Record of the Examination

It is almost always advisable to have the voir dire examination recorded by the court reporter. If you do not ask that the voir dire be recorded, then you hardly will ever reverse the trial court on appeal, because in the absence of a record, a presumption arises that the trial court made correct rulings. *Pyles v. United Servs. Auto Ass'n.*, 804 S.W.2d 163, 164 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Unless excused by agreement of the parties, a court reporter must attend all sessions of court and make a full record of the proceedings. *Rice Food Mkts., Inc. v. Ramirez*, 59 S.W.3d 726, 731 (Tex. App.—Amarillo 2001, no pet.); TEX. R. APP. P. 13.1 (a).

Despite these legal requirements that court reporters follow their official job description, the practical reality is that unless someone requests that voir dire be recorded, most court reporters will not be present, and you should not expect the trial judge to request a record that could be used later as a basis for reversal. If no record is made of voir dire examination, then you should present the complained of error to the trial court in the form of a bill of exception. See *Tumlinson v. San Antonio Brewing Ass'n*, 170 S. W. 2d 620, 625 (Tex. Civ. App.—San Antonio 1943, writ ref'd); TEX. R. APP. P. 33.2.

IX. QUESTIONING THE VENIRE PANEL-VOIR DIRE EXAMINATION

Once pre-trial matters related to voir dire are taken care of, the real work begins. A properly prepared attorney will then focus on the scope of questioning allowed and will cover those permissible areas raised by the facts on trial. Also, consideration must be given to the trial court's role as arbiter of the voir dire examination.

A. Counsel's Role in Formulating the Scope of Questions

In jury selection, attorneys are given wide latitude, so they can “discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised.” *Babcock v. Northwest Mem'l Hosp.* 767 S.W.2d 705, 709 (Tex. 1989); *Loredo v. State*, 59 S.W.3d 289, 291 (Tex. App.—Corpus Christi 2001, no pet.). In short, the purpose of voir dire is to “seat a fair and impartial jury.” *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 889 (Tex. 1985). During voir dire, a trial court should allow lawyers to state enough about the facts of the case that prospective jurors can know if they have a bias. *Lubbock Bus Co. v. Pearson*, 277 S. W. 2d 186 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.) “A court abuses its discretion when its denial of

the right to ask proper questions on voir dire examination prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges.” *McCoy v. Wal-Mart Stores, Inc.* 59 S.W.3d 793, 797 (Tex. App.-Texarkana 2001, no pet.) “In reviewing a contention that the trial court abused its discretion by not allowing a party to ask further questions of the venire members to discover any bias or prejudice, three factors are relevant: (1) whether a party's voir dire examination reveals an attempt to prolong the voir dire; for example, whether the questions were irrelevant, immaterial, or unnecessarily repetitious; (2) whether the questions that were not permitted were proper voir dire questions; and (3) whether the party was precluded from examining venire members who served on the jury.” *McCoy*, 59 S.W.3d at 797. Beyond this obvious requirement not to preclude lawyers from asking questions of venire members, the scope of voir dire examination becomes quite a bit more confused. An examination of the case law reveals certain areas of permissible inquiry and other areas which are almost always taboo.

1. Permissible Areas of Inquiry.

There are quite a number of areas of proper voir dire examination allowed by appellate courts. Many of these areas of inquiry are so common and well-received, that you almost never will have difficulty raising them. However, in the rare instance when the trial court tries to disallow an area of questioning, what follows is a fairly exhaustive compilation of topic areas permitted by the courts.

Permissible areas of inquiry for voir dire examination include:

- a. a juror's acquaintances or relationships with opposing counsel, *Anderson v. Owen*, 269 S.W. 454, 455 (Tex. Civ. App.—Galveston 1924, no writ);
- b. a juror's membership in secret societies, *Burgess v. Singer Mfg. Co.*, 30 S.W. 1110, 1111 (Tex. Civ. App.—1895, no writ);
- c. a juror's acquaintance or relationship with potential witnesses in the case, *Employers' Mut. Liab. Ins. Co. of Wis. v. Butler*, 511 S.W.2d 323, 325 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.);
- d. a juror's financial interest in the litigation, *Carey v. Planter's State Bank*, 280 S.W.251, 252 (Tex. Civ. App.—San Antonio 1926, writ dism'd w.o.j.);

- e. a juror's bias about the parties and subject matter of the case, *TEX. GOV'T CODE ANN.* § 62.105 (Vernon 2005);
- f. the juror's bias about a party's use of intoxicants, *Flowers v. Flowers*, 397 S.W.2d 121, 122 (Tex. Civ. App.—Amarillo 1965, no writ);
- g. whether jurors would automatically give more credence to the testimony of medical experts than lay witnesses, *Travelers Ins. Co. v. Beisel*, 382 S.W.2d 515, 518 (Tex. Civ. App.—Amarillo 1964, no writ);
- h. brief summarizations of a defendant's pleadings, *Dallas Ry. & Terminal Co. v. Flowers*, 284 S.W.2d 160 Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.);
- i. references that the defendant would deceive, mislead and/or confuse the jury, *Texas Employers Ins. Ass'n v. Loesch*, 538 S.W.2d 435, 440-42 (Tex. Civ. App.—Waco 1976, writ ref'd);
- j. a comment by the defense attorney that plaintiff was appealing an adverse ruling from the Industrial Accident Board, *Lauderdale v. Ins. Co. of N. Am.*, 527 S.W.2d 841, 843 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.);
- k. a comment that the defendant had killed the plaintiff's predecessor in title, in a trespass to try title case in which assault was also alleged, *Burleson v. Finley*, 581 S.W.2d 304, 307 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.);
- l. a reference by the insurer in a worker's compensation case to a previous injury and other pending lawsuits, *Alcocer v. Travelers Ins. Co.*, 446 S.W.2d 927, 928 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ);
- m. whether the jury would consider, in a will contest case based on undue influence, that witnesses to the will were employed and controlled by the other party and the expressions of the testatrix, *Rothermel v. Duncan*, 365 S.W.2d 398, 401-02 (Tex. Civ. App.—Beaumont), *rev'd on other grounds*, 369 S.W.2d 917 (Tex. 1963);
- n. prejudice about the amount of money involved, *Fenton v. Wade*, 303 S.W.2d 816, 817 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) ;
- o. whether the jury could, if allowed by the evidence, award a specific sum of damages in any given case, or whether a juror was prejudiced against awarding some specific

- amount of damages, no matter what the evidence, *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex. Civ. App.—Houston [14th Dist.] 1984), *rev'd, in part, on other grounds*, 696 S.W.2d 549 (Tex. 1985);
- p. questioning concerning doctors who might be called to testify, *Gonzales v. Texas Employers Ins. Ass'n*, 419 S.W.2d 203, 211-12 (Tex. Civ. App.—Austin 1967, no writ);
- q. areas of potential bias or prejudice, including the lawsuit crisis or the “insurance” crisis arising since the push for tort reform, *Babcock v Northwest Mem'l Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989); and
- r. in seatbelt products-liability or airbag defect cases, questions on bias against non-users of seat belts, or parents who leave their children unbelted in the front seat. *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848, 856 (Tex. App.—San Antonio 2003, pet. granted).

2. Impermissible Topics on Voir Dire.

Appellate courts also recognize a few areas that a lawyer may not delve into when questioning the venire panel. Most such topics would be covered in boilerplate motions in limine, but the cases inform trial courts of the boundaries that surround areas of questioning. These include:

- a. references to settlement agreements, *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347 (Tex. 1968), unless the agreement to settle constitutes a “Mary Carter” agreement, defined as a settlement in which the settling party retains a financial stake in the plaintiff's recovery *and* remains a party at the trial of the case. *Elbaor v. Smith* , 845 S.W.2d 240, 247 (Tex. 1992);
- b. hints about a party's available insurance coverage, *A. J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); although it is not proper to advise a jury about insurance coverage, not every reference to insurance will result in an automatic reversal of the case, *Myers v. Searcy*, 488 S.W.2d 509, 514-15 (Tex. Civ. App.—San Antonio 1972, no writ);
- c. a juror's personal dating habits, *De la Garza v. State*, 650 S.W.2d 870 (Tex. App.—San Antonio 1983, writ ref'd);

- d. any mention of matters otherwise inadmissible in evidence, especially if raised by a motion in limine, *Travelers Ins. Co. v. Deleon*, 456 S.W.2d 544 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.);
- e. questions about any criminal offense that would disqualify a juror, TEX. R. CIV. P. 230;
- f. questions that would advise the jury of the effect of their answers, *Texas Employers Ins. Ass'n v. Loesch*, 538 S.W.2d 435, 442 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.);
- g. attempts to learn the weight a potential juror might give to certain critical evidence, *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd).
- h. questions that would commit the jury to certain views or conclusions on ultimate issues in the case, *Lassiter*, 41 S.W.2d at 90; *Campbell v. Campbell*, 215 S.W. 134, 137 (Tex. Civ. App.—Dallas 1919, writ ref'd). Despite the ruling in this case, however, it is proper to “qualify” a juror or “commit” a juror to follow the proper law in a case.

In addition to these topic areas which are not permissible, appellate decisions reject certain questioning based on form. These include:

- a. overly broad questions, *Smith v. State*, 703 S.W.2d 641, 645 (Tex. Crim. App. 1985);
- b. repetitive vexatious questions, *Abron v. State*, 523 S.W.2d 405, 408 (Tex. Crim. App. 1985);
- c. leading questions by the court in an attempt to “rehabilitate” a venire member, *Flowers v. Flowers*, 397 S.W.2d 121, 123-24 (Tex. Civ. App.—Amarillo 1965, no writ); and
- d. any attempt by counsel to “commit” a juror to a particular outcome. *Greg Wolf Drilling Co. v. Boutte*, 154 S.W.3d 725, (Tex. App.—Houston [14th Dist.] 2004); *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848 (Tex. App.—San Antonio 2003, pet. granted).

B. The Trial Court's Role in Voir Dire

Before any voir dire questioning starts, a trial judge must administer an oath to the potential jurors that they will truthfully answer any questions concerning qualifications. TEX. R. CIV. P. 226.

Thereafter, the trial judge usually will read a list of admonitory instructions set forth in the rules by the Texas Supreme Court. TEX. R. CIV. P. 226a. Upon reading these instructions, the role of the trial judge in Texas state courts is not an active role, and the judge is called upon only to rule on objections. The most prominent role in voir dire is played by the potential jurors themselves: “The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and attitudes.” TEX. R. CIV. P. 226a.

However limited the active role of trial judges may be during questioning, judges are allowed broad discretion to impose reasonable limitations on the scope of an attorney's examination and to disallow questions that are only remote or tenuous. *Green v. Liaon*, 190 S.W.2d 742, 748 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.). This authority flows from a trial judge's discretion to control the nature and extent of voir dire. See *Fort Worth & Denver City Ry. v. Kiel*, 195 S.W.2d 405, 410 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.).

This broad discretion is not unique to Texas. See, e.g., *Lawson v. Commonwealth*, 53 S.W.3d 534, 539 (Ky. 2001) (“The ability to effectively and intelligently exercise peremptory challenges or challenges for cause does not justify unlimited voir dire on any topic.”); *Williams v. Southeastern Pa. Transp. Auth.*, 741 A.2d 848 (Pa. App. 1999) (“Scope of voir dire rests in sound discretion of trial court” not to be reversed absent “palpable error.”); *Butler ex rel. Commerce Bank, N.A. v. HCA Health Servs. of Kansas, Inc.*, 6 P.3d 871 (Kan. App. 1999) (“Appellate courts will not interfere with the trial court's determination of the extent of the examination of prospective jurors during voir dire” absent “a clear abuse of discretion.”); *Irish v. Gimbel*, 691 A.2d 664 (Me. 1997) (same); *Burke v. Schaffner*, 683 N.E.2d 861 (Ohio App. 1996) (test is one of reasonableness). Likewise, the federal courts recognize it. See, e.g., *James v. Continental Ins. Co.*, 424 F.2d 1064 (3rd Cir. 1970) (holding that federal rules confer upon trial judge “broad” discretion both as to manner in which voir dire is to be conducted and type and scope of questions); see also *Langley v. Turner's Express, Inc.*, 375 F.2d 296 (4th Cir. 1967).

Ordinarily, trial courts should allow lawyers wide latitude in asking their questions in voir dire. *Hayanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied). A trial court abuses its discretion if it forbids questioning about a potential juror's background, experiences, and attitudes concerning something reasonably related to issues at trial. *Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989).

The supreme court recently acknowledged that “the rules of civil procedure contain no rule on voir dire” *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005). However, it identified “a few” rules from the case law, the very first of which is, “that voir dire examination is largely within the sound discretion of the trial judge and that broad latitude is allowed for examination,” citing the *Babcock* case from 1985. Of course this quote represents not one, but two rules, and it leaves out those rules stated in cases this paper gleaned from case law, which is compiled in the preceding paragraph and section IX-A, above.

Obviously, the supreme court did not mean to nor was it required to canvass all the case law. Its main concern was with rehabilitation of jurors who seem to indicate bias or prejudice. See *Cortez*, 159 S.W.3d at 194. Apart from missing some of the voir dire cases, the *Cortez* opinion goes on to relate these notable rules on a trial court’s role in restraining the conduct of voir dire:

- courts may place reasonable limits on questions that are “duplicative or a waste of time.” 159 S.W.3d at 92;
- courts should not be “too hasty in cutting off examination that may yet prove fruitful.” *Id.*;
- courts may prohibit “attempts to preview a venire member’s likely vote.” *Id.* at 94.

X. ELIMINATING VENIRE-PANEL MEMBERS

Despite your most expert and focused attempts, some narrow-minded, predisposed, and biased jurors will not be persuaded by your presentation. To properly represent your client, you will want to excise these people before they do your case harm. The key to identifying their bias and removing them may be in finding out whether they had formed their biased opinions “before [they] entered [the courtroom].” *Cortez*, 159 S.W.3d at 94; JIM M. PERDUE, *A Practical Approach to Jury Bias*, 54 TEX. BAR J. 936, 940 (1991). These jurors can be removed from the jury that hears your case through use of challenges for cause, peremptory challenges, and possibly by obtaining the agreement of the trial court and opposing counsel to excuse them for other reasons.

A. Challenges for Cause.

Rules 227 and 229 of the Texas Rules of Civil Procedure allow parties in a civil case to challenge prospective jurors if they show evidence of certain specific statutory reasons that they are unfit for jury service. There is no limitation on the number of panel members that may be challenged for cause.

One ground for challenging a juror for cause is a general “unfitness” ground found in Rule 228. Otherwise, there must be some fact brought forth in voir dire examination that by law disqualifies the prospective juror from sitting in your case. There are seven particular reasons a juror is not qualified by law for service on a jury.

First, you must ask whether the juror meets the qualifications prescribed by TEX. GOV’T CODE ANN. §§62.102, 62.103. Thus, jurors are disqualified if they (1) are under eighteen years of age; (2) are not a citizen of Texas or of the county in which the person is to serve as a juror; (3) are not qualified under the Texas constitution and laws to vote in the county; (4) are not of sound mind and good moral character; (5) cannot read or write; (6) served on a petit jury for six days during the preceding three months in the county court or during the preceding six months in the district court; (7) are a convicted felon or (8) the prospective juror is under indictment or other legal accusation of a misdemeanor, felony theft, or any other felony.

Second, you must determine whether the juror is legally blind or deaf if, in the opinion of the court, the prospective juror’s handicap renders him or her unfit to serve as a juror in this particular case. TEX. GOV’T CODE ANN. § 62.104, 62.104(1).

Third, the juror would be disqualified to serve on the jury if he or she is a witness in the case on trial. TEX. GOV’T ANN. § 62.105(1).

Fourth, a juror is disqualified if he or she is interested, directly or indirectly, in the subject matter of the case. TEX. GOV’T CODE ANN. § 62.105(2).

Fifth, a juror is disqualified if he or she has a bias or prejudice in favor of or against a party in the case. TEX. GOV’T CODE ANN. § 62.105(4).

This is perhaps the most commonly-used ground for a challenge for cause. So strong is this disqualifying criterion that the supreme court has reversed a case for failure to strike a venire member who did no more than agree with another potential juror’s statement. One venire member who adopts another’s statement that she “could not be fair and objective” should have been struck for cause. *Sheperd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). However, a venire member’s “equivocal” statements of “slight bias” or “leaning a little toward” one side are not enough to constitute bias. *Goode v. Shoukfeh*, 943 S.W.2d 441, 453 (Tex. 1997). This ground includes a disposition of a juror against awarding a specific sum of money damages in any type of case, not just the case on trial. *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex. Civ. App.—Houston [14th Dist.] 1984), *rev’d, in part, on other grounds*, 696 S.W.2d 549 (Tex. 1985).

It used to be the law that once a juror expressed a bias or prejudice, the juror could not be rehabilitated. *See State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001, no pet.); *White v. Dennison*, 752 S.W.2d 714, 718 (Tex. App.—Dallas 1988, writ denied); *Gum v. Schaefer*, 683 S.W.2d 803, 808 (Tex. App.—Corpus Christi 1984, no writ); *Erwin v. Consolvo*, 521 S.W.2d 643, 646 (Tex. Civ. App.—Fort Worth 1975, no writ); *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref’d n.r.e.); *Lumbermen’s Ins. Corp. v. Goodman*, 304 S.W.2d 139, 145 (Tex. Civ. App.—Beaumont 1957, writ ref’d n.r.e.);

Now, all these cases have been “disapproved” by the supreme court, which has stated, “[W]e disagree that there is such a rule.” *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005). In sub-part X-D below, the paper discusses these changes in the role of rehabilitation.

Sixth, a juror is disqualified if he or she has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact. TEX. GOV’T CODE ANN. § 62.105(5).

Seventh, a juror may not serve in a case when a party to the case is related by consanguinity or affinity within the third degree to the juror. TEX. GOV’T CODE ANN. § 62.105(3).

Jurors may also be disqualified for reasons that are not set forth in TEX. GOV’T CODE ANN. § 62.105. Challenges for cause outside the scope of the statute may be addressed to a trial court’s sound discretion. *Texas Power & Light Co. v. Adams*, 404 S.W.2d 930, 944 (Tex. Civ. App.—Tyler 1966, no writ). However, a trial court’s ruling on a challenge for cause not based on §62.105 will not be disturbed on appeal unless it is clear that a fair and impartial trial was thereby prevented. *Moss v. Fidelity & Cas. Co.*, 439 S.W.2d 734 (Tex. Civ. App.—Fort Worth 1969, no writ).

The method and scope of making a challenge for cause is not very well defined. The better practice is to examine the juror about a particular disqualifying category, and then to move that the juror be disqualified for cause by trial court. This can be done out of the hearing and presence of the venire panel.

Both sides are given an opportunity to question a juror before he or she is excused for cause, but once a prospective juror has exhibited a bias or prejudice as to the parties or the subject matter of the lawsuit, a juror’s general affirmation that the bias or prejudice can be set aside and the case tried fairly on the basis of the law and evidence should be disregarded. *Gum v. Schaefer*, 683 S.W.2d 803 (Tex. App.—Corpus Christi 1984, no writ). However, to disqualify the prospective juror, such bias or prejudice will be evaluated based on the

“record, taken as a whole,” which must “clearly show[] that a venire member was materially biased.” *Cortez*, 159 S.W.3d at 92. When such bias is clearly shown and it is “material,” then a venire member’s “ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the venire member’s disqualification.” *Id.* Trial courts are allowed to use their “sound discretion” in deciding the “proper stopping point in efforts to rehabilitate a venire member.” *Id.*

B. Peremptory Challenges

Peremptory challenges are allowed for almost any reason, except for intentional and systematic exclusion of persons solely on the basis of race, ethnicity, and gender. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28 (1991) (race); *Powers v. Palacios*, 813 S.W.2d 489, 490-91 (Tex. 1991) (race); *Hernandez v. N.Y.*, 500 U.S. 352 (1991) (ethnicity); *Wamget v. State*, 67 S.W.3d 851, 857 (Tex. Crim. App. 2001) (ethnicity); *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994) (gender); *Fritz v. Texas*, 946 S.W.2d 844, 847 (Tex. Crim. App. 1997) (gender). It is reversible error for a trial court to allow peremptory challenges to be used as a basis for excluding a juror on account of race.

Apart from this use of peremptory challenges to exclude certain “suspect classes” of jurors, a strike may be exercised by a litigant without assigning any reason. TEX. R. CIV. P. 232. In Texas state district courts, each side is allowed six strikes, and in civil county courts, three strikes are allowed per side. TEX. R. CIV. P. 233.

The use and allocation of strikes becomes much more complicated in a multi-party lawsuit. In such a case, a trial court must first align the parties on each side of the docket. TEX. R. CIV. P. 233. The term “side” of the docket is not synonymous with a “party,” “litigant,” or “person.” A “side” consists of one or more litigants who have a common interest on a matter about which the jury is concerned. TEX. R. CIV. P. 233. Once the parties or litigants are aligned on the same “side,” the trial court must then determine whether any of the litigants aligned on the same side are antagonistic with respect to any matter to be submitted to the jury. TEX. R. CIV. P. 233; *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 920-21 (Tex. 1979).

If there is no antagonism between parties on the same side of a case, each side must receive the same number of jury strikes. *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986). In the case of *Vargas v. French*, the trial court erred in giving six strikes to the plaintiff and twelve (six each) to two defendants, because the pleadings reflected no antagonism between the defendants, and nothing

occurred during voir dire examination to show that the defendants were antagonistic. *Vargas v. French*, 716 S.W.2d 625, 627 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

In deciding how strikes should be allocated among the “sides” the trial court must consider any matter brought to its attention concerning the ends of justice and the elimination of an unfair advantage. Tex. R. Civ. P. 233. In doing so, the court should consider the pleadings, discovery, and exculpatory statements made during voir dire. *Garcia*, 704 S.W.2d at 736-37. On appeal, a reviewing court will judge the action of the trial court in light of the information presented before the exercise of peremptory challenges, and not in light of circumstances or events after strikes are made. *Garcia*, 704 S.W.2d at 737; *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986).

Litigants on the same “side” are ordinarily entitled to confer with each other before exercising their strikes. *Sisco v. Hereford*, 694 S.W.2d 3, 8 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). Still, a decision about whether to disallow collaboration in exercising strikes is within the trial judge’s discretion. *Id.* at 9.

C. Excusing Otherwise Qualified Jurors.

Even though one is otherwise legally qualified to serve, a juror may claim a statutory exemption. Statutory exemptions from jury service exist for (1) persons over sixty-five; (2) persons who have legal custody of a child under ten years of age, if jury service would necessitate leaving the child or children without adequate supervision; (3) students of private or public secondary schools; (4) persons who are enrolled in and in actual attendance at an institution of higher education; (5) persons in a county of 200,000 or more people who have served during the twenty-four month period preceding the date persons are to appear for jury service, unless the jurors are selected by electronic or mechanical means in accordance with § 62.011 of the government code; (6) and officers or employees of the legislative branch of government.

In addition to these statutory exemptions, which may or may not be claimed, a trial judge may excuse persons with physical or mental impairments or with an inability to comprehend or communicate the English language. TEX. GOV’T CODE ANN. § 62.109. Economic reasons are not a sufficient basis for excusing a prospective juror unless all parties of record are present and approve the excuse. TEX. GOV’T CODE ANN. § 62.110(c). These reasons may be urged on the trial court, except for economic circumstances, as a basis to excuse a juror who is otherwise qualified to serve.

D. Rehabilitation of Venire-panel Members.

For years, the appellate courts strenuously defended the rights of a litigant to strike a potential juror who expressed bias. *See* section III-A, above. Even if stated in passing, a veniremember’s expression of bias or prejudice was said to disqualify that juror. This year, that inclination to grant challenges to biased venire members has changed.

First, what is “bias or prejudice?” Section 62.105 of the Texas Government Code provides that “[a] person is disqualified to serve as a petit juror in a particular case if he . . . has a bias or prejudice in favor of or against a party in the case.” TEX. GOV’T CODE ANN. § 62.105 (Vernon 1998). As the supreme court has said:

Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true.

Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963). According to one appellate court, “[t]he test is whether the evidence shows the juror will not act with impartiality or will act with prejudgment.” *Brentwood Fin. Corp. v. Lamprecht*, 736 S.W.2d 836, 839 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

“A prospective juror who admits bias or prejudice is disqualified to serve as a juror.” *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998); *accord Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998); *Compton v. Henrie*, 364 S.W.2d at 182. Legions of appellate court decisions upheld the proposition that a juror who admits bias or prejudice was disqualified as a matter of law. *See, e.g., State v. Dick*, 69 S.W.3d 612, 620; *W.D.A. v. State*, 835 S.W.2d 227, 229 (Tex. App.—Waco 1992, no writ); *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). “Bias or prejudice disqualifies a juror as a matter of law and removes all discretion from the trial judge.” *State v. Dick*, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001, no writ); *accord Shepherd*, 962 S.W.2d at 34. These cases had held that only when the potential juror does *not* admit his bias or prejudice does the trial court have discretion to make a factual determination whether the juror should be disqualified. *Malone*, 977 S.W.2d at 564; *Shepherd*, 962 S.W.2d at 34. It seemed that *any* hint of bias or prejudice mattered.

Under these decisions, before the supreme court's holding in *Cortez*, once a prospective juror admitted his bias or prejudice, that venire member could not be rehabilitated by counsel or the court, and any affirmation by the juror that he could have set aside his bias or prejudice and could decide the case on the law and evidence was *entirely disregarded*. *Shepherd v. Ledford*, 926 S.W.2d 405, 411 (Tex. App.—Fort Worth 1996), *aff'd*, 962 S.W.2d 28, 34 (Tex. 1998); *accord State v. Dick*, 69 S.W.3d at 620; *W.D.A. v. State*, 835 S.W.2d at 229; *Sullemon v. United States Fidelity & Guar. Co.*, 734 S.W.2d 10, 14 (Tex. App.—Dallas 1987, no writ); *Carpenter*, 501 S.W.2d at 750; *Lumberman's Ins. Corp. v. Goodman*, 304 S.W.2d 139 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

A landslide of authority prevented additional questions once a juror had said she was biased. “Once bias has been established, questioning of a venire person should not continue until he is worn down and says the magical words ‘fair and impartial’ and that he can be bound by the court’s charge.” *State v. Dick*, 69 S.W.3d at 620. Moreover, even if the prospective juror was “rehabilitated” by the court or counsel, and stated that he could be fair to both sides, the trial court still had to dismiss the juror. *Shepherd*, 962 S.W.2d at 34; *State v. Dick*, 69 S.W.3d at 620; *Gum v. Schaefer*, 683 S.W.2d 803, 808 (Tex. App.—Corpus Christi 1984, no writ). Put simply, the law was: A potential juror who had expressed any inability to be fair or impartial, or who had shown bias toward the case or its subject matter, could not be rehabilitated. *Carpenter*, 501 S.W.2d at 750.

These restrictions on rehabilitation have eased. Much of this law is affected by the supreme court's recent decision in *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 92 (Tex. 2005). Now, litigants and the trial court are permitted to explore the basis—and the extent—of the juror's supposed prejudice.

But prejudice is often in the eye of the beholder. For example, forty years ago, the supreme court defined bias as “an inclination toward one side of an issue” rather than the other such that it leads to the “inference that he will not . . . act with impartiality.” *Compton v. Henrie*, 364 S.W.2d 179, 181-82 (Tex. 1963); *accord El Hafi v. Baker*, 48 TEX. SUP. CT. J. 648 (Tex. May 13, 2005). Now, in the *Cortez* decision, the supreme court has again noted that bias is a matter of definition and degree. “An initial ‘leaning’ is not disqualifying if it represents skepticism rather than an unshakeable conviction.” *Cortez*, 159 S.W.3d at 94. The Court looks backwards in deciding bias: “the relevant inquiry is not where jurors *start* but where they are likely to *end*.” *Id.*

E. Preservation of Error in Voir Dire

The timing and substance of challenges to the trial court's rulings on your questions, your strikes, or your challenges for cause is critical. The timing will vary according to whether a challenge for cause is involved or a peremptory challenge has been made. The substance of a particular objection must also be considered. These matters must always be kept at the ready. In scope, the relevant considerations are timing, substance, and impermissible areas of inquiry, including the *Batson* case and its progeny. Each of these is discussed in turn.

1. Timing.

To properly preserve error, the timing of your objections or recorded statements will vary depending on whether your objection is to the allocation of strikes, the granting of a challenge for cause, or the basis of your opponents' use of strikes based on *Batson* issues.

a. Peremptory Challenges.

Because peremptory challenges may be exercised for almost any reason, there is no basis for objection except in two instances. First, you may object because the trial court has not properly equalized the strikes between the “sides,” or secondly, you may object because your opponent has exercised strikes in a racially discriminatory manner.

To properly preserve error in the allocation of strikes, you must make a motion to equalize or you must object to the unequal allocation of strikes. This should be done after the court makes a ruling allocating jury strikes and before the strikes are actually used.

If the basis of your objection is a racially discriminatory use of strikes by your opponent, your objection must be made after the exercise of your opponent's peremptory challenges. Naturally, this is the only time when you may prove that a certain class or group of prospective jurors was kept off the jury by your opponent based on some impermissible, discriminatory use of jury strikes. Counsel should be careful to make the objection at the proper time or it may be deemed waived on appeal. Appeals courts have ruled that waiver occurs “by failing to rebut the county's reasons for striking Juror Number Eight at the time he raised his claim. In *United States v. Arce*, 997 F.2d 1123, 1126-27 (5th Cir. 1993).” *Wright v. Harris County*, No. 07-20413, 2008 WL 2780909 (5th Cir. July 18, 2008) (Smith, J.) (addressing the importance of contradicting supposed racially-neutral reasons for peremptory challenges made, or risk waiving a *Batson* claim at all).

The objection to your opponent's discriminatory use of strikes should be made on the record and in the presence of opposing counsel and the court, but outside the presence of the jury. It is best that you say on the record that you are complying with these requirements, as the fact of opposing counsel's presence will not be apparent from the cold, written record unless you say it and your opponent does not disagree.

b. Challenges for Cause.

To preserve error for appeal on a trial court's refusal to grant a challenge for cause, you must first challenge a juror for cause before you exercise any peremptory strike. Then, if the trial judge denies your challenge, you should object before you use your strikes. See *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 889-90 (Tex. 1985). The specific substance, as opposed to the timing, of these objections will be discussed below.

2. Substance.

The substance of your record for appellate purposes is equally as important as the timing. The substance of your statements on the record will again vary depending on whether you are complaining of error in peremptory challenges, challenges for cause, or challenges to the way your opponent struck based on the *Batson* line of cases.

a. Peremptory Challenges.

As to peremptory challenges, again the complaint is a failure of the trial court to give you enough strikes. The substance of your complaint, which must be pointed out to the trial judge before the peremptory challenges are exercised, is that there is no real antagonism between the parties on any one side of the case, considering the pleadings, information disclosed by pre-trial discovery, information and representations made during voir dire of the jury panel, and any other information brought to the attention of the trial court before the exercise of the strikes by the parties. *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986). In making this proof, you should quote specific statements made by opposing counsel during voir dire that may indicate a lack of antagonism between the parties on one side of the case. If there is no antagonism, then the court must determine if there was harmful error in the allocation of strikes. In doing so, the appellate court will consider the entire record, including the statement of facts. If a trial is "hotly contested and the evidence sharply conflicting, the error [in allocation of strikes] results in a material unfair trial without showing more." *Garcia*, 704 S.W.2d at 737.

b. Challenges for Cause.

Like an objection to a misallocation of peremptory strikes, an objection to a trial court's refusal to excuse a juror for cause should be made before you exercise peremptory challenges. You must establish that the court's denial of the challenge for cause was harmful, usually by showing that an unacceptable juror will sit in the case despite your use of all your peremptory strikes. *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 889-90 (Tex. 1985). Therefore, it is useful to renew your objection to the failure to grant a challenge for cause after you have exhausted all of your strikes. If your challenge to the juror for cause is overruled, you must advise the trial court that (1) you have or would exhaust all of your peremptory challenges, and (2) that after exercising all of your peremptory challenges, a specific objectionable juror would or has remained on the jury panel. *Id.*

In making a challenge for cause, and preserving the error when your challenge should have been (but was not) granted, you are not required to state why a particular venire member is objectionable to you. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.2d 87, 91 (Tex. 2005). This begs the question whether *Batson* problems would occur. However, it is clear from reading *Cortez* and the earlier *Hallett* cases that a party must use a peremptory challenge against the venire member involved, exhaust its remaining peremptory strikes, and notify the trial court that a specific objectionable juror will remain. *Id.* at 90. The reason for this is to give the trial court a chance to decide whether a party was forced to accept an objectionable juror, and the time to correct the error in denying a challenge for cause by granting an additional peremptory strike. The timing is also critical, and it is discussed in the section above.

c. Challenges to the Way Your Opponent Struck Based on *Batson* and its Progeny.

Your opponent is not allowed to intentionally and systematically exclude persons solely on the basis race, ethnicity, and gender. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28 (1991) (race); *Powers v. Palacios*, 813 S.W.2d 489, 490-91 (Tex. 1991) (race); *Hernandez v. N.Y.*, 500 U.S. 352 (1991) (ethnicity); *Wamget v. State*, 67 S.W.3d 851, 857 (Tex. Crim. App. 2001) (ethnicity); *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994) (gender); *Fritz v. Texas*, 946 S.W.2d 844, 847 (Tex. Crim. App. 1997) (gender). To preserve error after your opponent has violated this constitutionally-mandated rule, you must be careful to follow certain steps.

First, you must state for the record and/or ask the court to take judicial notice that your client is a member of an identifiable group on the basis of race, sex, national origin, or is part of another “suspect” class. Second, you must show from the strike list used by your opponent, that your opponent has struck members of that group from the jury panel. Finally, you must establish on the record that your opponent struck those members from the panel for unjustifiable reasons.

To prove unjustifiable and discriminatory use of peremptory challenges by your opponent, you should ask the trial court to conduct a hearing at which you will cross-examine the opposing counsel. You should question your opponent about the reasons for the strikes he or she made. If there is not an evident reason other than race for discriminatory exercise of the strikes, then you have won. If your opponent offers some non-racial or nondiscriminatory reason for the use of his strikes, you should attempt to demonstrate that other members of the venire panel with these same non-racial characteristics were left on the jury by your opponent. For example, if your opponent struck a black juror because he said the juror was involved in a prior lawsuit as a plaintiff, attempt to show that other former plaintiffs were left on the jury. If this is true, then the trial court would be correct in inferring that the actual reason for the strike was racially motivated.

The burden of proof in this *Batson* type hearing is quite important. Once you have demonstrated that your opponent has struck members of a cognizable group, then the burden shifts to your opponent to prove some non-discriminatory, proper basis for their exclusion other than race, color, religion, sex, national origin, or economic status. You should attack these supposed nondiscriminatory reasons based on your use of juror information sheets and ask the court to take judicial notice of the group status of the jurors and the parties in the case.

Before the Texas Supreme Court now is a case involving the extent to which a trial lawyer can give non-verbal reasons for her decision to strike a member of the venire panel. In *Davis v. Fisk Elec. Co.*, No. 06-0612, the supreme court is considering whether a lawyer can state on the record her non-racially motivated reasons for striking a potential juror, when those reasons, such as shrugging shoulders, or a frown, or body language, is not apparent from the spoken words on the record. The case was argued April 9, 2007, and a decision is expected in due course from the supreme court.

XI. MOTIONS FOR DIRECTED VERDICT

A motion for directed verdict can be oral or written, and it may be made at the close of the plaintiff’s case or at the close of all the evidence. Some old cases hold that you must obtain a written ruling in order to complain on appeal of the trial court’s denial of the motion. *See, e.g., Steed v. Bost*, 602 S.W.2d 385 (Tex. Civ. App.—Austin 1980, no writ). *But see Sipco Serv. Marine, Inc. v. Wyatt Field Serv. Co.*, 857 S.W.2d 602 (Tex. App.—Houston [1st Dist.] 1993, no writ) (Cohen, J., concurring) (criticizing those cases that require a written ruling as a prerequisite for a complaint that the trial court erroneously overruled a motion for directed verdict).

Under the new appellate rules, it is likely that these cases will not survive. Under the amended rules, a signed written order should not be a prerequisite to a complaint on appeal. As rule 33.1 (c) states: “Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.” TEX. R. APP. P. 33.1(c). But until they are overruled, careful lawyers will still want to get signed orders.

XII. CLOSING ARGUMENTS

In order to preserve a complaint concerning improper jury argument, a party should:

- (1) timely object to the improper argument;
- (2) ask for an instruction that the jury should disregard the argument; and
- (3) move for a mistrial.

See, e.g., Armellini Express Lines v. Ansley, 605 S.W.2d 305 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.). However, recent cases have considered complaints of error that fell short of these requirements. *Krishnan v. Ramirez*, 42 S.W.3d 205, 220n.3 (Tex. App.—Corpus Christi 2001, pet. denied) (recognizing that “in general” the new rule has loosened the once mandatory rule that an express ruling is required to preserve a complaint for appeal). There, the trial court’s statement in closing argument that “You may proceed” was enough. *Id.* at n. 3. “It is apparent the trial court was aware of appellant’s objection and appellee’s response to the objection. By telling appellee to proceed following this exchange, the trial court implicitly overruled appellant’s objection. Thus, the issue was preserved for our review.” *Id.*